Supreme Court, U.S.
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No. 99-1881

IN THE

Supreme Court of the United States

ALBERT KRAMER, *et al.*,

Petitioners,

v.

MARILYN PRICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a civil rights lawsuit under 42 U.S.C § 1983, does the failure to appeal from a pretrial order denying qualified immunity to two police officers result in a waiver of the issue insofar as it is based on the record that existed at the time of the pretrial order?

2. Where two jurors withhold pertinent background information on voir dire that directly relates to the case and then disclose that information during deliberations, does such conduct deprive a party of a fair trial?

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SUMMARY OF OPPOSITION

1. Petitioners do not address the fact that there was an intervening *trial by jury* between the pretrial denial of qualified immunity and Petitioners' appeal. Petitioners cite no authority for their position that an appeal of a pretrial denial of qualified immunity after a jury verdict must be decided only on the pretrial record, ignoring the facts found by the jury. The cases cited by Petitioners only affirm the undisputable proposition that qualified immunity is not waived by failing to take an interlocutory appeal. None of the cited cases support the position that a jury verdict should be disregarded in deciding qualified immunity.

2. Both the District Court and the Ninth Circuit found that the jurors in question did *not* intentionally withhold information on *voir dire*, and that the inadvertent omissions were not "relevant" and did *not* involve "pertinent background information" that "directly relates to the case". Petitioners have failed to demonstrate that the applicable standards for reversal based on jury misconduct were met.

LACK OF JURISDICTION

Rule 10 of the Rules of the United States Supreme Court provides that this Court may grant a petition for a writ of certiorari only for compelling reasons. Rule 10 also provides that such petition will rarely be granted when "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Respondents submit that Petitioners have failed to satisfy Rule 10, and their Petition should be denied.

INTRODUCTION

This case involves two police officers who, without reasonable suspicion or probable cause, stopped Respondents' vehicle and submitted Respondents, teenagers with no prior experience with the police, to a terrifying experience in which Petitioners pointed their guns at Respondents' heads and deliberately and painfully squeezed Respondents' testicles while searching them. Petitioners then lied repeatedly about what had happened. A jury found Petitioners liable, and imposed a total of $245,000 in compensatory and punitive damages.

Without permission from the District Court, Petitioners had an investigator follow the jurors to their homes and interrogate them, whereupon statements made by the jurors were used as a basis for a motion for a new trial. After an evidentiary hearing, the District Court denied the motion. Petitioners then appealed, raising the denial of pretrial qualified immunity, and the failure to grant qualified immunity post-trial. The Ninth Circuit reviewed the qualified immunity determination based on the findings made by the jury and affirmed. It likewise affirmed the District Court's findings that the alleged juror misconduct did not warrant a new trial. Petitioners filed a petition for rehearing, which did not address the alleged jury misconduct, but raised the identical arguments presented here. The petition was denied.

QUALIFIED IMMUNITY

Petitioners' imply that the Ninth Circuit refused to review the denial of Petitioners' entitlement to qualified immunity because they failed to take an interlocutory appeal. That is simply not the case.

As a threshold matter, Petitioners did *not* request qualified immunity in conjunction with either a motion to dismiss [Fed. R. Civ. P. Rule 12] or a motion for summary judgment [Fed.R.Civ.P. Rule 56]. Rather, Petitioners sought immunity through a "motion in limine". [Appendix at 60a] In doing so, Petitioners neatly avoided the strictures of both Rule 12(b)(6), which requires the allegations of the complaint to be taken as true, and Rule 56, which requires *evidence* to support the claim for judgment.

Petitioners' *in limine* motion neither conceded the allegations in the complaint nor submitted evidence in support of judgment. Rather, it set forth Petitioners' unsworn version of the facts and asked the District Court to grant qualified immunity based on those allegedly "undisputed" facts.

Respondents opposed the motion, arguing that the facts alleged by Petitioners were vigorously disputed by Respondents, thus precluding pretrial qualified immunity. [Appendix at 73a] The District Court agreed. [Appendix at 49a] Specifically, the District Court relied on Respondents' allegations that Petitioners had approached Respondents with their guns drawn and pointed at Respondents, and that Petitioners had deliberately squeezed Respondents' testicles while searching them. Petitioners denied doing these things. The District Court found that these disputed facts must be resolved by a jury. Petitioners did not appeal this ruling and allowed the matter to go to trial.

The jury found Petitioners liable for violating Respondents' constitutional rights. No basis for liability could have been found if the jury had accepted Petitioners' version of the operative facts, *i.e.*, that Petitioners had

probable cause to stop Respondents' vehicle, did not point their guns at Respondents, did not deliberately squeeze Respondents' testicles while searching them, and did not conduct an unlawful search of Respondents' vehicle. The jury plainly rejected Petitioners' testimony, and believed Respondents' version of the incident, *i.e.*, that Petitioners *did* unlawfully stop Respondents' vehicle, pointed their guns in Respondents' faces, maliciously squeezed Respondents' testicles, and unlawfully searched their car. Since Petitioners denied doing these acts, it is undisputable that they could not claim that they "reasonably believed" it was "lawful" for them to do what they expressly denied doing.

Moreover, the award of punitive damages further negated Petitioners' claims. The jury was instructed that "[y]ou may award punitive damages only if you find that the defendant's conduct was malicious, wanton, or oppressive or in reckless disregard of the plaintiff's rights." The jury awarded Respondents $225,000 in punitive damages, a finding totally irreconcilable with Petitioners' argument that they "reasonably believed their conduct was lawful." The award of punitive damages demonstrates that the jury found Petitioners' conduct to have been, at the very least, unreasonable.

Petitioners have never explicated how the jury's verdict could support qualified immunity. Petitioners do not argue that pointing guns in Respondents' faces because they were not wearing seatbelts was objectively reasonable. Nor have they ever argued that it was objectively reasonable to squeeze Respondents' testicles. Nor did they justify searching Respondents' car without probable cause. Rather, they denied doing these things.

The jury did not believe Petitioners' version of the incident. It found Petitioners liable and imposed punitive damages. By no stretch of the imagination could it be said that the facts found by the jury supported qualified immunity.

Accordingly, to grant post-trial qualified immunity would have required the District Court to completely disregard the evidence adduced at trial and the jury's verdict. It is not surprising that the record reveals no request from Petitioners for the District Court to do so.[1] Nor did Petitioners make any such reference in their briefs to the Ninth Circuit. It thus appears that Petitioners' contention is that the District Court should have *sua sponte* granted qualified immunity *after* the jury found Petitioners liable and imposed $225,000 in punitive damages against them. Therefore, what Petitioners necessarily argued was that the jury verdict was wrong, and it should have been disregarded by the District Court.

This was the posture Petitioners presented to the Ninth Circuit. Petitioners demonstrated no entitlement to qualified immunity after the facts had been developed at trial. They spent only 2½ pages of their 70 page brief arguing in support of post-trial qualified immunity. Those arguments were meritless. Petitioners' first argument was that the District Court had failed to consider the "totality of the circumstances" by holding that Petitioners' observations before the stop "were not cumulative" for purposes of assessing probable cause. The second was that the District Court's evidentiary rulings prevented it from "properly assessing" Petitioners' conduct.

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1. Petitioners' Motion for a New Trial significantly did *not* mention qualified immunity.

Petitioners' "totality of the circumstances" argument was that in determining whether there was probable cause to stop Respondents, the District Court failed to consider whether the existence *vel non* of the alleged California Vehicle Code violations should be aggregated with Petitioners' claims that Respondents were acting "suspiciously".[2] However, the question of whether there was probable cause to stop Respondents for Vehicle Code violations was *necessarily* separate and distinct from the claim that Respondents were acting "suspiciously". Simply said, the alleged "suspicious behavior" could not bear on whether there was probable cause to believe Respondents were violating the Vehicle Code. Likewise, having a taillight out or not wearing a seat belt did not make Respondents any more "suspicious". As stated by the District Court, Petitioners "either had probable cause on the basis of the light and the seat belts or they didn't."

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2. It should be noted that Petitioners did not object below to the comments it later challenged on appeal. In any case, Petitioners' contention is misleading. The alleged comments *were not even made in the context of a legal determination of probable cause*. Rather, they were off-the-cuff comments made during the discussion of an unrelated issue: the relevance and/or admissibility of Respondents' hand-drawn diagrams. Respondents argued that the diagrams were relevant to refute Petitioners' claim of "suspicious behavior" by Respondents. At this point the District Court made comments to the effect that the allegedly "suspicious behavior" could not provide probable cause absent the Vehicle Code violations, while the Vehicle Code violations would provide probable cause even absent the "suspicious behavior". This was a correct statement of the law, but one without any legal effect. The District Court excluded the diagrams, and the probable cause issue went to the jury. The District Court never instructed or otherwise advised the jury of any judicial determination on the issue. Thus, there was no possible prejudice to Petitioners' case.

The District Court correctly opined that Petitioners either did or did not have probable cause to stop Respondents' vehicle based solely on the Vehicle Code violations, and that the alleged "suspicious behavior" did not change the analysis.[3] The need to consider all the evidence does not convert the "totality of the circumstances" into a talismanic mantra that requires the aggregation of irrelevant facts into a whole that cannot be justified by the sum of its parts. Probable cause is determined on an objective basis, which does not rest upon "[r]igid legal rules," but rather on a "common sense," "practical," and "nontechnical" analysis. *Illinois v. Gates*, 462 U.S. 213, 230-232, 103 S. Ct. 2317, 2328-29 (1983). Petitioners' argument on this issue was completely meritless.

Petitioners also argued that the District Court erred in not allowing defendant Kramer to demonstrate how he performed his search of Respondents' testicles.[4] Petitioners alleged that "without seeing the method of the search" the District Court could not "properly assess his conduct." However, the District Court had already rejected Petitioners' claim of qualified immunity. Simply said, it was the *jury* that "assessed" Kramer's squeezing of Respondents' testicles, not the District Court.

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3. The Ninth Circuit rejected the validity of Petitioners' claims of "suspicious behavior", noting that it "controverted their principal defense at trial", and furthermore that the "factors that [Petitioners] cite, whether taken together or separately, are either improper or inadequate for purposes of establishing reasonable suspicion." [Appendix at 16a]

4. Petitioners did not object to the District Court's ruling at the time and raised the issue for the first time on appeal.

Respondents each testified that Defendant Kramer painfully pulled and squeezed their testicles. For his part, Kramer flatly *denied* doing it. The jury's verdict conclusively demonstrates that they believed Respondents and not Kramer. Petitioners do not suggest how a demonstration of Kramer's testicle-searching technique would have convinced the jury that he was telling the truth.[5] In sum, the gist of Petitioners' argument was again that the District Court erred in failing to believe Petitioners and accordingly disregard the jury's verdict.

Petitioners' claims on appeal thus not surprisingly focused on their request for pre-trial qualified immunity, where the only "evidence" was the allegations made in Respondents' complaint and the counter-allegations in Petitioners' *in limine* motion. Petitioners argued that disputed facts should not preclude pretrial qualified immunity, because "A defense of qualified immunity should only be denied where the facts alleged by the defendant officer could not support a reasonable belief that his conduct was lawful" [AOB23], and "If an unsubstantiated allegation were to preclude a finding of qualified immunity, the doctrine would never be applied." [AOB26]

In other words, the plain import of Petitioners' argument was that qualified immunity should be decided solely on their version of the facts, even without any sworn evidence, and therefore, qualified immunity here should be decided *solely* on the basis of the pretrial record, *regardless* of what the jury later found. [Appendix at 12a]

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5. Indeed, such a conclusion would be highly unreasonable, in light of the plethora of impeachment presented to the jury, including Kramer's admission that he had testified falsely under oath in the hearing on the citations issued to Respondents.

The Court of Appeal was thus presented with a thinly veiled request to stand the law of qualified immunity on its head, requiring the District Court to presumptively resolve disputed facts pre-trial in favor of Petitioners. Petitioners essentially argued that the request for pre-trial qualified immunity "froze" the evidentiary record, allowing Petitioners to take their chances at trial, secure in the knowledge that the jury verdict was of no moment, and would have no meaning unless it exonerated them. The Ninth Circuit understandably declined to grant such license.

Petitioners present no cognizable argument for review of this matter. Petitioners' claim that the decision of the Ninth Circuit "conflicts with the holdings of at least three other circuits" has no merit. Petitioners have cited cases that stand for the proposition that failure to take an interlocutory appeal of a denial of qualified immunity does not bar raising the issue on appeal from a final judgment, while erroneously contending that these cases also stand for the proposition that such review must be made *only* on the pretrial record. As correctly noted by the Ninth Circuit:

> In their Petition for Rehearing (PFR), [Petitioners] mischaracterize our opinion so that it appears we disagree with the general rule — as articulated in other federal circuits — that an interlocutory appeal on the issue of qualified immunity is mandatory not permissive. On the contrary, our decision is fully consistent with the PFR's claim that the appropriate rule to apply is: "an interlocutory appeal from an adverse pretrial ruling on qualified immunity is permissive, not mandatory, and the *issue* is not waived in a later appeal."

[Appendix at 44a]

Reviewing the cases cited by Petitioners, it is clear that the Ninth Circuit's analysis of Petitioners' arguments was entirely correct. The "conflict" alleged by Petitioners is in fact nonexistent.

Ernst v. Child and Youth Services of Chester County, 108 F.3d 486 (3rd Cir. 1997) addressed "whether and to what extent child welfare workers . . . are entitled to absolute immunity for actions taken in connection with dependency proceedings in state court." [108 F.3d 488] One of the Petitioners cross-appealed from the denial of immunity, and the appellant argued that the court of appeal lacked jurisdiction to entertain the cross-appeal because the defendant had not taken an interlocutory appeal from the denial of immunity. [*Id.* at 492] The court rejected that argument, holding that "an interlocutory appeal from a denial of summary judgment on immunity grounds, although permitted, is not obligatory." [*Id.*] The court held it had jurisdiction "to consider the immunity issue". [*Id.* at 493] There was no suggestion that the review was limited to the pretrial record.

In *Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993), after a jury found in favor of a defendant officer, the district court granted a new trial. The defendant officer thereafter moved for summary judgment on qualified immunity grounds, which was denied. [*Id.* at 1112-1113] The defendant officer then took an interlocutory appeal. The issue presented was whether the officer had forfeited his right to an interlocutory appeal by failing to assert the qualified immunity defense before the first trial. *Spann* held it was not, but affirmed the denial of summary judgment. In doing so, the court necessarily reviewed the "pretrial record", since the second trial had not yet occurred. Nothing in *Spann* suggests that

this limited review would be appropriate *post-trial.* To the contrary, *Spann* expressly noted that the record the court considered included, among other things, the transcript from the *first* trial.

Goff v. Bise, 173 F.3d 1068 (8th Cir. 1999) involved Petitioners who moved for summary judgment based on qualified immunity. The motion was denied and the case was tried to a jury, which rejected the Petitioners' version of the events and found them liable for compensatory and punitive damages. [*Id.* at 1071] On appeal, the court noted that it normally declined to review the denial of a motion for summary judgment after a trial on the merits. The court found denial of summary judgment based on qualified immunity is an exception to the rule, and accordingly that "the issue of qualified immunity is properly before us." [*Id.* at 1072] *Goff* then affirmed the denial of summary judgment.

Thus, the cases cited by Petitioners affirm the undisputed proposition that failure to take an interlocutory appeal of the denial of qualified immunity does not waive the *issue* on direct appeal from a final judgment. However, they do not require a court of appeal to ignore the trial record. This difference was pointed out by the Ninth Circuit:

> In our opinion, we differed, however, with appellants' suggestion that the summary judgment *order*, as opposed to the qualified immunity *issue*, is reviewable after the final judgment — *i.e.*, that the Court of Appeals should review the pretrial denial of qualified immunity on the basis of the evidentiary record at the time of summary judgment. We held that the qualified immunity *issue* is reviewed on the basis of the full record

> prior to *final* judgment and not on the limited record that existed at the time of summary judgment.

[Appendix at 45a]

In denying Petitioners' petition for Rehearing, the Ninth Circuit also cited 15A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3911, n.80 (2nd Ed. 1992), for the general rule that:

> Failure to appeal pretrial denial of a motion for summary judgment based on official immunity, for example, may be followed by a trial that produces information different from the information made available on the summary judgment motion. *Review after trial should be based on the sufficiency of the evidence at trial, not the sufficiency of the evidence on the summary judgment record.*

[Appendix at 45a, (*emphasis added by the Ninth Circuit*)]

None of the cases cited by Petitioners holds to the contrary. Petitioners have presented no grounds to merit this Court's review of this issue.

JURY MISCONDUCT

On this issue, Petitioners do not contend that the decision below created a "conflict", or discuss any of the other bases for review set forth in Rule 10. Their sole claim is that they were denied a "fair trial" by virtue of juror misconduct.

Petitioners brought their claims of juror misconduct to the attention of the District Court in a motion for a new trial. [Appendix at 109a] The District Court held a post-trial evidentiary hearing to evaluate the claims, and ruled that Petitioners' allegations did not merit reversal. [Appendix at 58a] The Ninth Circuit agreed.

Petitioners do not contend that there is some legal impediment to the Ninth Circuit's ruling. They do not dispute that the controlling rule of law is *McDonough Power Company v. Greenwood*, 464 U.S. 548 (1984). Nor do they suggest that the Ninth Circuit's ruling failed to accord *McDonough*. Rather, they simply disagree with the Ninth Circuit's conclusion, expressing the same arguments here that they did on appeal and before the District Court, *i.e.*, that the courts should have ruled in their favor.[6]

Thus, Petitioners conclusorily state that their claim of juror misconduct satisfied the two-prong test of *McDonough*. [Petition at 19] However, the record speaks to the contrary.

The first *McDonough* prong addresses whether "a juror failed to answer honestly a material question on voir dire". Here, the District Court made specific findings that the alleged omissions resulted from "honest mistake[s]" on the part of two jurors which indicated neither dishonesty nor bias. The Ninth Circuit found "no reason to conclude otherwise" and "no cause to reverse the district court's decision." [Appendix at 36a-37a]

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6. No reconciliation is attempted with Rule 10's advisory that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Petitioners do not dispute these findings; rather, they ignore them. Indeed, Petitioners apply their own version of *McDonough*, where the test is now satisfied anytime a juror fails to divulge a fact on *voir dire*, irrespective of whether the omission was honestly made. [Petition at 19] Since it is undisputed that omissions were made, Petitioners therefore contend the first prong of *McDonough* is satisfied. However, the Court has expressly rejected the concept that "a juror's mistaken, though honest response to a question" can satisfy *McDonough*. [464 U.S. 555] Petitioners do not argue that this reasoning is inapplicable here.

Similarly, Petitioners fail to explain how they have satisfied the second *McDonough* prong: whether "a correct answer would have provided a valid basis for a challenge for cause." Rather, Petitioners again set up their own standard, *i.e.*, that if they knew the substance of the jurors' omissions, it is "undisputed" that they would have *challenged* the jurors for cause.[7] Significantly, the requirement that there be a *valid basis* for the challenge is not discussed by Petitioners. Instead, Petitioners apparently contend that the fact that they *allegedly* would have made a challenge is sufficient, regardless of whether there was any *valid basis* for the challenge.

Petitioners provide no argument or citation to authority to support their contention that the second prong of *McDonough* was satisfied here. To the contrary, the Ninth Circuit expressly found that even if the jurors in question had revealed the omitted information in *voir dire*, the information "would not have provided grounds for a

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7. The appendix citations provided by Petitioners on this point notably do not support that contention.

challenge for cause." [Appendix at 38a] Petitioners do not suggest any basis for invalidating that finding, aside from implying that a different conclusion should have been drawn.

In sum, Petitioners do precisely what Rule 10 counsels against. They ask this Court to find that the lower courts made erroneous factual findings and misapplied the applicable law. Even assuming that had occurred (an assumption categorically unsupported by the record), it suggests no cognizable basis for the Court to grant review. In fact, were the Court to review in detail the evidentiary hearing conducted by the District Court, it would be readily apparent, as it was to the District Court, that Petitioners' allegations were taken out of context, did not accurately reflect the actual statements made by the jurors, and could on no account support a finding of juror bias such as would satisfy *McDonough*. Both the District Court and the Ninth Circuit correctly rejected Petitioners' claims, and no valid reason has been presented why this Court should do otherwise.

CONCLUSION

Justice was properly served in this case. Petitioners violated Respondents' constitutional rights, and a jury held them to answer after a fair trial. Petitioners have failed to present any reason why this Court should review the lower courts' determinations. The Petition should be denied.

Respectfully submitted,

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